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No. 91-1569

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

DR. DAMON HILL, JR., STEPHANIE HILL, KATHYL ANDERSON, SANDRA SALAZAR and DR. SAM SPIKES,

Petitioners,

vs.

TEXAS EDUCATION AGENCY (LUBBOCK INDEPENDENT SCHOOL DISTRICT), *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT LUBBOCK INDEPENDENT SCHOOL DISTRICT

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QUESTIONS PRESENTED

(1) This Court does not have jurisdiction to consider the petition for certiorari complaining of the denial of petitioners, motion to intervene in a suit which was originally filed by the United States on August 7, 1970. After the District Court's denial of petitioners' motion to intervene, petitioners did not file a motion in the Fifth Circuit Court of Appeals to stay or enjoin the hearing on respondent's motion to modify the desegregation decree pursuant to Rule 8, Federal Rules of Appellate Procedure, pending the appeal by petitioners of the denial of their motion to intervene. Respondent's motion to modify the desegregation plan has already been heard by the District Court and a final judgment rendered thereon together with an order dissolving all prior orders and injunctions and dismissing the case. Therefore, petitioners' claim of improper denial of their motion to intervene is now moot and presents no case or controversy under Article III, United States Constitution.

(2) The decision of the Fifth Circuit in *Bush v. Viterna*, 740 F.2d 350 (5th Cir. 1984), is correct and is not in conflict with this Court's decision in *Trbovich v. United Mine Workers*, 404 U.S. 528, 92 S. Ct. 630, 30 L. Ed. 2d 682 (1972) or other decisions of this Court or other circuits. To the contrary, the Fifth Circuit in *Bush v. Viterna*, 740 F.2d 350 (5th Cir. 1984), cited and followed the statement of this Court in *Trbovich* with respect to the "minimal" burden of showing inadequate representation.

(3) Petitioners' contention (that the courts below erred in following cases holding that a presumption of adequate representation exists) even if assumed for purpose of argument to be correct, is not controlling of the lower courts' denial of petitioners' motion to intervene because petitioners did not even meet the "minimal" burden of showing inadequate representation by the United States and, as pointed out both by the District Court

and Fifth Circuit, there was abundant and overwhelming evidence of adequate representation by the Government over a period of some 21 years.

(4) The denial of petitioners' motion to intervene is not material because the overwhelming evidence presented in a four-day trial before the District Court supports the District Court's judgment sustaining respondent's motion to modify desegregation order, granting final unitary status to LISD dissolving all prior injunctions and orders and dismissing the case, which judgment is now final.

LIST OF PARTIES

The petitioners in this case are Dr. Damon Hill, Jr., Stephanie Hill, Kathyl Anderson, Sandra Salazar and Dr. Sam Spikes.

Respondents are the Lubbock Independent School District (Lubbock, Texas); the United States of America; and the Texas Education Agency.

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No. 91-1569

In The

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DR. DAMON HILL, JR., STEPHANIE HILL, KATHYL ANDERSON, SANDRA SALAZAR and DR. SAM SPIKES,

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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT LUBBOCK INDEPENDENT SCHOOL DISTRICT

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

NOW COMES LUBBOCK INDEPENDENT SCHOOL DISTRICT (LUBBOCK, TEXAS), one of the respondents herein,

and submits its brief in opposition to petition for writ of certiorari to the United States Court of Appeals to the Fifth Circuit, and would respectfully show the following:

OPINIONS BELOW

The opinion of the United States District Court of the Northern District of Texas denying petitioners' motion to intervene is dated June 11, 1991. Such opinion, styled *United States v. Texas Educ. Agency*, is reported in 138 F.R.D. 503 (N.D. Tex. 1991).

The decision of the United States Court of Appeals for the Fifth Circuit dated December 30, 1991, affirming the judgment of the District Court, is reported at 952 F.2d 399. The opinion of the Fifth Circuit (unpublished) is contained in the Appendix at the conclusion of this brief (1a).

The District Court conducted a four-day trial on the merits of respondent's motion to modify desegregation plan and other matters on August 13-16, 1991.

The District Court rendered judgment approving such proposed modification, granting final unitary status, dissolving all prior orders and injunctions, and dismissing the case on September 18, 1991. A copy of the District Court's memorandum opinion and order is included in the appendix to the petition for writ of certiorari (B1-72).

However, petitioners did not include the six-page appendix to Judge Woodward's memorandum opinion and order dated September 18, 1991, and a copy of such appendix is included in the appendix to this brief (5a).

Likewise, petitioners did not include the judgment of the District Court dated September 18, 1991, and a copy of such

judgment is also included in the appendix to this brief (16a).

The United States filed a notice of appeal with respect to the District Court's judgment of September 18, 1991, but subsequently filed a motion for voluntary dismissal of the appeal with the Clerk of the United States Court of Appeals for the Fifth Circuit on January 21, 1992, and, pursuant to Rule 42, Federal Rules of Appellate Procedure and Rule 42.1 of the Fifth Circuit, the above-referenced appeal was duly entered dismissed on January 21, 1992. A copy of the motion for dismissal and entry of dismissal is included in the appendix hereto (18a).

STATEMENT OF JURISDICTION

Petitioners' petition for certiorari complaining of the District Court's denial of its motion to intervene is now moot and presents no present case or controversy under Article III, United States Constitution.

If the subject of an appeal has become moot, an appellate court has no jurisdiction to decide it. *In re Taylor*, 916 F.2d 1027, 1028 (1) (5th Cir. 1990); *Eitel v. Holland*, 787 F.2d 995 (1) (5th Cir. 1986), *judgment rendered on other grounds*, 798 F.2d 815 (5th Cir. 1986), *reh'g denied*, 801 F.2d 398 (5th Cir. 1986); *Laborers Intern. v. Nat. Post Off. Mail Handlers*, 880 F.2d 1388 (2) (D.C. Cir. 1989); *In re Grand Jury Subpoena Dated June 5, 1985*, 825 F.2d 231 (2) (9th Cir. 1987).

The order of the District Court of which petitioners complain denying the proposed intervention was entered on June 11, 1991.

Petitioners filed a notice of appeal and on July 18, 1991 filed a motion in the District Court to enjoin further proceedings in the case pending determination of their appeal of the denial of their motion to intervene.

The District Court entered an order denying petitioners' motion for injunction on July 19, 1991.

The hearing on the merits of the proposed desegregation plan was not scheduled to commence and did not commence until August 13, 1991.

Rule 8, Federal Rules of Appellate Procedure, provides for a motion to stay an order of the district court pending appeal.

Rule 8 even contains an emergency procedure for application to and consideration by a single judge of the court of appeals of an application for stay or injunction pending appeal in cases where the normal procedure of consideration by a panel or division of the court would be impractical due to the requirements of time.

Petitioners filed no motion whatsoever in the Court of Appeals pursuant to Rule 8, Federal Rules of Appellate Procedure, to stay or enjoin hearing on the proposed modification to the desegregation plan pending their appeal of the order of the District Court denying their motion to intervene.

The District Court conducted a four-day trial on the proposed modification and other matters from August 13-16, 1991 and entered its judgment granting such proposed modifications granting final unitary status, dissolving all prior orders and injunctions, and dismissing the case on September 18, 1991.

Such judgment is now final.

The United States of America filed a notice of appeal but subsequently filed a motion for voluntary dismissal and the appeal was entered dismissed by the Fifth Circuit on January 21, 1992 (18a).

Thus, the hearing in which petitioners sought to intervene has already been conducted, a final judgment entered, and petitioners' motion to intervene is now moot.

Furthermore, the alleged conflict between the decision of the Fifth Circuit Court of Appeals in *Bush v. Viterna*, 740 F.2d 350 (5th Cir. 1984), and the decision of this Court in *Trbovich v. United Mine Workers*, 404 U.S. 528, 92 S. Ct. 630, 30 L. Ed. 2d 682 (1972), does not exist. To the contrary, the decision of the Fifth Circuit in *Bush* cited and followed the decision of this Court in *Trbovich*.

Also, the presumption of adequate representation complained of by petitioners is not controlling with respect to the denial of petitioners' motion to intervene because the courts below specifically held in essence that petitioners did not even make a "minimal" showing of inadequate representation and there was abundant evidence of adequate representation of petitioners' interest by the United States over a period of some 21 years, as is further discussed below.

FEDERAL RULE INVOLVED

This petition for writ of certiorari involves Rule 24, Federal Rules of Civil Procedure pertaining to intervention. A verbatim copy of this Rule is contained in the appendix to this brief (21a).

STATEMENT OF THE CASE

For purpose of brevity, petitioners are sometimes referred to in this brief as "Hill" and the respondent, Lubbock Independent School District as "LISD".

This suit was originally filed by the United States against LISD and others on August 7, 1970.

On March 2, 1988 a consent decree was entered by the District Court concerning unitary status and other matters and on May 3, 1988, the District Court entered an order and findings of fact and conclusions of law in which the District Court found, *inter alia*, that LISD had eliminated all vestiges of a *de jure* segregated school system; that LISD had satisfactorily complied in all material respects with the consent decrees and orders which had been entered in the case, and that the dual school system had been dismantled and all its vestiges eliminated.

The order of May 3, 1988 provided for retention of jurisdiction by the District Court over the case for three years and specified at the conclusion of that period, the court would provide plaintiffs with an opportunity to show why the case should not be dismissed, and if such cause is not shown, the case would be dismissed with prejudice, the injunction dissolved, the judgment discharged, and jurisdiction terminated.

LISD filed a motion to modify the existing desegregation plan on February 11, 1991.

Hill filed a motion to intervene with respect to the LISD motion on March 13, 1991.

The United States Magistrate Judge (to whom the motion to intervene was assigned for hearing) conducted a hearing on the motion to intervene and heard testimony on such motion for three days. Subsequent to the hearing the Magistrate Judge in exhaustive findings, conclusions and recommendations recommended that the proposed intervention be denied.

The District Court entered an order adopting such findings, conclusions and recommendations and denied the motion to intervene. *United States v. Texas Educ. Agency*, 138 F.R.D. 503 (N.D. Tex. 1991).

The District Court in such order did grant amicus curiae status to the intervenors and such order further specifically provided:

> Accordingly, the proposed intervenors may give such input directly to the Government as they desire, and shall further be permitted to file their Amicus Curiae Brief stating their position regarding the proposed modification of the desegregation plan.

138 F.R.D. at p. 508.

Petitioners did in fact submit briefs to the District Court on the merits of the proposed modification and did fully participate as amicus curiae in the hearing on respondent's motion to modify desegregation plan. Petitioners' attorney, Mary Alice McLarty, was present throughout virtually the entire hearing (offering suggestions and advice to the United States trial attorney), as was Linda DeLeon, a member of the Board of Trustees of the LISD, who was one of the intervenors in their cause prior to 1988 and up until the District Court's order of May 3, 1988.

The District Court in its decision denying the motion to intervene noted the express provisions of Rule 24(a), Federal Rules of Civil Procedure, providing for intervention of right providing for such intervention only (1) when the statute of the United States confers an unconditional right to intervene or (2) when an applicant claims an interest relating to the transaction which is the subject to the action and the applicant is so situated that the disposition of the action may impair or impede the applicant's ability to protect that interest " . . . unless the applicant's interest is adequately represented by existing parties".

The District Court correctly held that where a party seeking intervention has the same ultimate objective as to a party to the

suit, the petitioner must demonstrate adversity of interest, collusion, or nonfeasance.

The District Court adopted the extensive findings, conclusions and recommendations of the Magistrate that there was no evidence of adversity of interest, collusion or nonfeasance on the part of the government.

The court noted, *inter alia:*

> As noted earlier, this case was initially filed by the Government in August, 1970. Over the years, numerous Orders have been entered by this Court, some over the strenuous opposition of the Government. Some Orders have been appealed. The Government has had numerous attorneys working on this case over the past 21 years. *The record in this case is replete with adequate and full representation by the Government on the issues before this Court.*

138 F.R.D. at 507. [Emphasis added.]

Such order denying intervention was affirmed by the Fifth Circuit Court of Appeals on December 30, 1991.

In its opinion, the Fifth Circuit said:

> Finally, the district court discounted the appellants' assertion that the government is guilty of nonfeasance. *The same district judge has presided over these proceedings since their inception in 1970. His opinion catalogues the diligent efforts of the government to achieve desegregation in LISD, and we give great weight*

> *to his conclusion that "[t]he Proposed Intervenors have wholly failed in showing inadequate representation on the part of the Government."*

(4a) [Emphasis added.]

As set forth under the statement pertaining to jurisdiction above, the order of the District Court denying petitioners' motion to intervene was entered on June 11, 1991.

Petitioners gave notice of appeal on July 5, 1991 and on July 10, 1991 filed a motion in the District Court to enjoin any hearing on the merits of the proposed desegregation plan pending their appeal of the District Court's order denying their motion to intervene.

The District Court entered an order denying petitioners' motion for injunction on July 17, 1991.

Petitioners did not appeal the order of the District Court denying injunction of the hearing on the merits, nor did petitioners file any motion in the Fifth Circuit pursuant to Rule 8, Federal Rules of Appellate Procedure, seeking to stay or enjoin the hearing on the LISD motion to modify desegregation plan pending their appeal of the court's denial of their motion to intervene.

The hearing on the merits of LISD'S motion to modify desegregation plan was not scheduled to commence and did not commence until August 13, 1991, which was almost one month after the District Court denied petitioners' motion to enjoin such hearing.

The District Court heard testimony for four days (August 13-16, 1991) on the merits of the proposed desegregation plan and on September 18, 1991, the District Court entered its

memorandum opinion, order, and judgment approving the proposed desegregation plan, granting final unitary status, dissolving all prior orders and injunctions, and dismissing the case (16a).

As also noted above, such judgment is now final.

On page i of the petition for writ of certiorari, petitioners make the statement that "The Justice Department has since voluntarily withdrawn from the case".

This statement is incorrect and untrue.

As discussed above, the District Court conducted a hearing on the merits of respondent's proposed motion to modify desegregation plan on August 13-16, 1991, and entered a judgment with respect thereto on September 18, 1991.

A notice of appeal was filed by the United States. The United States subsequently moved to dismiss the appeal, and the appeal was duly entered dismissed by the Clerk for the Fifth Circuit Court of Appeals on January 21, 1992 (18a). The Justice Department did not withdraw from the case.

Two other inaccurate statements made by petitioners should be noted.

On page 8, petitioners state that on January 17, 1992, the United States Justice Department filed a motion in the Fifth Circuit asking "to be withdrawn" from the appeal.

The United States did not file any motion asking to be withdrawn from the appeal. As stated above, the United States filed a motion dismissing the appeal and the appeal was entered dismissed by the Clerk for the Fifth Circuit.

On page 12, petitioners state that the Justice Department filed a brief in the Fifth Circuit spelling out four points of disagreement with the LISD's desegregation plan.

The United States did not file a brief in the Fifth Circuit.

The United States obtained an extension of time for the filing of their brief and before such time expired, filed their motion to dismiss the appeal, as referred to above.

SUMMARY OF ARGUMENT

(1) Jurisdiction.

This appeal by petitioners of the order denying their motion to intervene in the hearing on respondent's motion to modify desegregation plan in the District Court is now moot and therefore there is no case or controversy under Article III, United States Constitution.

When petitioners' motion to intervene was denied, petitioners sought a stay or injunction of the hearing on the merits in the District Court but when such motion for stay or injunction was denied, petitioners did not file a motion in the Fifth Circuit pursuant to Rule 8, Federal Rules of Appellate Procedure, to stay or enjoin the hearing on the merits pending the appeal of the denial of petitioners' motion to intervene. The hearing on the merits was conducted on August 13-16, 1991, and a judgment was rendered granting the motion to modify, granting final unitary status, dissolving the prior orders and injunctions, and dismissing the case on September 21, 1991.

(2) There is no conflict of decisions.

The decision of the Fifth Circuit Court of Appeals in *Bush*

v. Viterna, 740 F.2d 350 (5th Cir. 1984), is correct and is not in conflict with the decision of this Court in *Trbovich v. United Mine Workers*, 404 U.S. 528, 92 S. Ct. 630, 30 L. Ed. 2d 682 (1972), which petitioners cite for the proposition that a party seeking to intervene need only make a "minimal" showing of inadequacy of representation by a present party to the suit.

The fact situation and issue before this Court in *Trbovich* is not even remotely similar to the issue in the case at bar and, in any event, the Fifth Circuit in the *Bush* case in fact cited and followed the dicta of this Court in *Trbovich* concerning a "minimal" showing for intervention. *Bush* is not in conflict with the decision of this Court in *Trbovich* or with any other decision of this Court or Circuit Court.

Likewise, the decision of the District Court and Fifth Circuit in the case at bar are not in conflict with any decision of this Court or Circuit Court.

(3) Presumption of adequate representation is immaterial.

Furthermore, petitioners' complaint that the courts below erred in following *Bush* and other cases holding that there is a presumption of adequate representation, even if assumed correct, presents no grounds for reversal of the lower courts' decision denying petitioners' motion to intervene.

As held by the District Court and Fifth Circuit, there is abundant and overwhelming evidence of adequate representation by the government of petitioners' interest for a period of over 21 years and therefore petitioners did not even make a "minimal" showing of inadequate representation by the United States.

(4) District Court's decision on the merits of the motion to modify desegregation plan is correct and is final.

Furthermore, the District Court heard four days of testimony

on respondent's motion to modify desegregation plan; there is abundant and overwhelming evidence supporting the District Court's order approving the motion to modify the plan and dismissing the case, which judgment is now final.

REASONS FOR DENYING THE WRIT

I.

JURISDICTION

As discussed above, the petitioners in this case did not attempt to stay the hearing on the merits of respondent's motion to modify desegregation order pursuant to Rule 8, Federal Rules of Appellate Procedure, pending the determination of their appeal to the Fifth Circuit of the order denying their motion to intervene.

A four-day hearing was conducted by the District Court on the motion and a judgment entered, which judgment is now final.

Therefore, petitioners' petition alleging error in the denial of its motion to intervene is now moot.

The authorities pertaining to this issue have already been discussed under the heading of Statement of Jurisdiction on pages 3-5 above and will not be repeated here.

II.

THERE IS NO CONFLICT OF DECISIONS.

Petitioners contend that the decision of the Fifth Circuit Court of Appeals in *Bush v. Viterna*, 740 F.2d 350 (5th Cir. 1984), and *State of Tex. v. United States Dept. of Energy*, 754 F.2d 550

(5th Cir. 1985), are in conflict with the decisions of this Court in *Trbovich v. United Mine Workers*, 404 U.S. 528, 92 S. Ct. 630, 30 L. Ed. 2d 682 (1972), and *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 87 S. Ct. 932, 17 L. Ed. 2d 814 (1967), which are asserted by petitioners to hold that under Rule 24, Federal Rules of Civil Procedure, as amended in 1966, the burden upon an applicant for intervention to show inadequate representation is "minimal" (Petition for Certiorari, pp. 16-17).

Contrary to petitioners' contention, the Fifth Circuit in *Bush* specifically cited and followed the statement made by this Court in *Trbovich* that the burden on the proposed intervenor to show inadequate representation should be treated as "minimal".

In *Bush*, the Fifth Circuit said:

> The requirement that an intervenor not be adequately represented by existing parties "is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10, 92 S. Ct. 630, 636 N. 10, 30 L.Ed.2d 686 (1972).

740 F.2d at 355.

In *State of Tex. v. United States Dept. of Energy, supra*, the Fifth Circuit noted that a presumption of adequate representation was recognized by this Court (in dictum) in *Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 689, 81 S. Ct. 1309, 1313, 6 L. Ed. 2d 604 (1961).

The Fifth Circuit said:

> There is a suggestion in the cases that where, as here, the existing representative in the suit is the government, there is a presumption of adequate representation which may be overcome by the intervenor only upon a showing of adversity of interest, the representative's collusion with the opposing party, or nonfeasance by the representative. *Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 689, 81 S.Ct. 1309, 1313, 6 L.Ed.2d 604 (1961) (dictum); 7A C. Wright & A. Miller, *Federal Practice & Procedure* § 1909 at 525-29 (1972). Indeed this presumption was adopted by a panel of this court in *Baker v. Wade*, 743 F.2d 236, 241 (5th Cir.1984) (rehearing en banc pending). The utilities have made no showing of such adversity of interest, collusion or nonfeasance.

754 F.2d at 553.

Furthermore, in *State of Tex. v. United States Dept. of Energy, supra*, the Fifth Circuit did not rely on the presumption of adequate representation. The Fifth Circuit further stated:

> Presumptions aside, the utilities have articulated no reason why the government will not adequately represent their interests in the pending appeal.

Likewise, in the case at bar, neither the District Court nor the Fifth Circuit relied upon the presumption of adequate representation, and held that there was abundant evidence of proper representation of petitioners' interests by the Government over a period of some 21 years. See the specific language of the District Court and Fifth Circuit quoted on pages 8-9 above.

There are a number of cases from various Circuit Courts in the United States holding that where the ultimate objective of the government (or other party to the suit) and the proposed intervenor is identical, there is a presumption that the United States (or some other party to the suit) does in fact adequately represent the interests of the proposed intervenors. *United States v. South Bend Community School Corp.*, 632 F.2d 623, 628 (7th Cir. 1982); *United States v. South Bend Community School Corp.*, 710 F.2d 394, 395-396 (7th Cir. 1983), *cert. denied*, 466 U.S. 926; *Commonwealth of Pa. v. Rizzo*, 530 F.2d 501, 505 (3d Cir. 1976), *cert. denied*, 426 U.S. 921; *United States v. City of Philadelphia*, 798 F.2d 81, 90 (3d Cir. 1986); *Meredian Homes Corp. v. Nicholas W. Prassas & Co.*, 683 F.2d 201, 205 (7th Cir. 1982); *United States Postal Service v. Brennan*, 579 F.2d 188, 191 (2d Cir. 1978).

See also, United States v. Hooker Chemicals & Plastics, 749 F.2d 968, 985 (2) (2d Cir. 1984).

The case of *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969), which petitioners also contend is in conflict with the decision of the Fifth Circuit in *Bush, inter alia*, involved a question of "interest" and "standing" and did not involve the issue of whether a proposed intervenor's interest was adequately represented by an existing party to the suit.

It is clear that neither the *Bush* case nor the decision of the District Court or Fifth Circuit in the case at bar are in conflict with the decisions of this Court in *Trbovich* or *Cascade Natural Gas Corp.*, or with the *Smuck* case and other similar cases cited by petitioners.

As noted above, the Fifth Circuit in the *Bush* case in fact specifically cited and followed the *Trbovich* case.

Furthermore, the *Trbovich* case did not even involve a

remotely analogous fact situation to the case at bar.

Trbovich involved an action by the Secretary of Labor under § 402(b) of the Labor and Management Reporting and Disclosure Act of 1959 ("LMRDA") to set aside an election of officers of the United Mine Workers of America on the ground that the election was held in a manner that violated the LMRDA.

The petitioner in *Trbovich*, who was a union member, had filed the initial complaint with the Secretary of Labor and then attempted to intervene in the suit which was brought by the Secretary of Labor.

This Court discussed the legislative history and held that the statute (LMRDA), as passed, permitted not only the government but union members to file suit in connection with an election. 30 L. Ed. 2d at 693.

Thus, *Trbovich* did not involve an attempted intervention under Rule 24, Federal Rules of Civil Procedure.

Furthermore, it is interesting to note that in *Trbovich* this Court held that even though the union member was entitled to intervene, the statute which permitted such intervention (LMRDA) limited any claims made by the intervenor with respect to the invalidity of the election to those claims which had been asserted by the Secretary of Labor and this Court held that no contention could be asserted by the intervenor union member which had not been asserted by the Secretary of Labor.

The *Cascade Natural Gas Corp.* case involved the question of whether or not the proposed intervenors were "adversely affected" by the divestiture order under the Clayton Act and did not involve the issue of whether the proposed intervenors were adequately represented by an existing party to the suit.

Petitioners also refer to a split of authority as discussed in 7A Wright & Miller, *Federal Practice & Procedure*, § 1908, pp. 271-272 (1986).

This discussion in Wright & Miller pertains to various decisions with respect to what constitutes a substantial legally protectable interest and, again, these decisions do not involve the question which is in issue in the case at bar which pertains to adequacy of representation of a petitioner's interest by the United States government.

III.

PRESUMPTION OF ADEQUATE REPRESENTATION IS IMMATERIAL.

Furthermore, in the case at bar, the presumption of adequate representation and the asserted contention by petitioners that only a "minimal" showing of inadequate representation is required is not even controlling with respect to the denial of petitioners' motion to intervene because, as discussed by the courts below, there was abundant evidence supporting the finding of adequacy of representation by the United States and there is in fact no evidence of probative weight of inadequate representation.

It is well settled that in order to be entitled to intervene as a matter of right under Rule 24(a)(2), Federal Rules of Civil Procedure, the party seeking to intervene must establish each of the following:

(1) timely application;

(2) an interest by applicant in the property or transaction involved;

(3) that disposition of the matter would impair or impede applicant's ability to protect that interest; and

(4) that applicant's interest is not adequately represented by a party or parties to the suit.

Association of Professional Flight Attendants v. Gibbs, 804 F.2d 318, 320 (5th Cir. 1986).

It is fundamental that the burden of establishing each of these four factors or elements for entitlement to intervention as a matter of right is upon the proposed intervenor. *Edmondson v. State of Nebraska*, 383 F.2d 123 (4) (8th Cir. 1967); *Delaware Valley Citizens' Council v. Com. of Pa.*, 674 F.2d 970 (4) (3d Cir. 1982).

In order to meet the burden of proving that an existing party (or parties) to the suit do not adequately represent the movant's interests, the movant must establish adversity of interest or collusion on the part of the party to the suit or a failure of the party to the suit to fulfill his (its) duty. *Bush v. Viterna*, 740 F.2d 350, 355 (5th Cir. 1984); *Bradley v. Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987); *Morgan v. McDonough*, 726 F.2d 11, 14 (1st Cir. 1984); *Liddell v. Caldwell*, 546 F.2d 768, 771 (4) (8th Cir. 1976).

In the case at bar, there is abundant evidence of adequacy of representation and absolutely no evidence of probative weight was produced by petitioners to establish adversity of interest, collusion, or failure of the United States to fulfill its duty.

It is well-settled that a mere disagreement between a party to the suit and the proposed intervenor over litigation strategy or over specific remedies or claims which should be asserted does not constitute any evidence of lack of capacity or insufficiency of representation of the proposed intervenor's interest by the federal government. *See Bradley v. Milliken*, 828 F.2d 1186, 1192

(6th Cir. 1987); *Pierson v. United States*, 71 F.R.D. 75, 80 (5) (D. Del. 1976); *Evans v. Buchanan*, 130 F.R.D. 306, 313 (3) (D. Del. 1990); *Pate v. Dade County School Bd.*, 588 F.2d 501, 503 (5th Cir. 1979), *cert. denied*, 444 U.S. 835; *United States v. Perry Cty. Bd. of Ed.*, 567 F.2d 277, 280 (5th Cir. 1978).

Obviously, in no case is it likely that there would ever be a total concurrence of position between the party to the suit and the proposed intervenor with respect to all of the aspects of the specific remedy or remedies which are the most significant and with respect to all aspects of litigation strategy.

Furthermore, it has been held that representation of a proposed intervenor's interest by a party to the suit is not inadequate merely because the proposed intervenor's motives for litigation are different from those of the existing party. *Natural Res. Defense Council v. N.Y. State D.E.C.*, 834 F.2d 60, 62 (1) (2d Cir. 1987).

In the case at bar, neither the District Court nor Fifth Circuit relied upon the presumption of adequate representation, but specifically held that there was abundant and overwhelming evidence of adequate representation by the government. In fact, there was no evidence to the contrary.

As noted above, the District Court discussed the history of the case since 1970 and concluded:

> The record in this case is replete with adequate and full representation by the government on the issues before the court.

138 F.R.D. at 507.

The Fifth Circuit in its opinion stated:

> The same district judge has presided over these proceedings since their inception in 1970. His opinion catalogues the diligent efforts of the Government to achieve desegregation in LISD, and we give great weight to his conclusion that "the Proposed Intervenors have wholly failed in showing inadequate representation on the part of the Government".

(4a).

Thus, it is clear that the petitioners in this case did not even meet the burden of establishing "minimal" evidence of inadequate representation and the issue of the presumption of adequate representation is not even relevant.

IV.

JUDGMENT ON THE MERITS IS CORRECT AND IS FINAL.

The principal objections which were asserted by petitioners to the respondent's proposed modification of its desegregation plan pertained to (1) the utilization of Dunbar High School as a junior high school, and (2) the location of the new junior high school.

It was specifically provided in the District Court's order of July 10, 1990 that the Trustees of the LISD Board had the sole discretion with respect to location of the new junior high school as long as it was located within a designated area. As stated therein, this judgment was a final judgment on all contested issues determined by such judgment.

This order was never objected to or appealed from.

Thus, any subsequent objection to the location of the junior high school as determined by the LISD was frivolous and groundless as a matter of law and could not in good faith have been asserted by the government or anyone else.

The other principal objection raised by intervenors to the proposed modification to the desegregation plan pertained to the proposal for reutilization of Dunbar High School as a junior high school. This proposal by respondent was strenuously opposed by the government throughout the entire proceeding.

The merits of intervenors' objections to the proposed modification to the desegregation plan are not relevant to this petition for writ of certiorari and all of the contentions asserted by petitioners with respect to the merits of petitioners' objections to respondent's motion to modify desegregation plan were extensively discussed in the brief of respondent, Lubbock Independent School District in the United States Court of Appeals for the Fifth Circuit (pp. 20-39).

The judgment of the District Court with respect to respondent's proposed modification of the LISD desegregation plan granting final unitary status, dissolving all prior orders and injunctions, and dismissing the case was entered on September 18, 1991 and such judgment is now final.

CONCLUSION

The petition for writ of certiorari should be denied for the reasons that (1) there is no jurisdiction, (2) there is no conflict of decisions, (3) any alleged conflict is immaterial because petitioners in this case did not even make a "minimal" showing of lack of adequate representation by the United States, and (4) judgment on the proposed modification to the LISD desegregation plan is correct and final.

WHEREFORE, respondent LISD prays that petitioners' petition for writ of certiorari be denied.

Respectfully submitted,

CECIL KUHNE
Counsel of Record
BRAD CRAWFORD
CRENSHAW, DUPREE &
MILAM, L.L.P.
Attorneys for Respondent
Lubbock Independent School
District

APPENDIX A — OPINION OF UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AFFIRMING JUDGMENT OF DISTRICT COURT (UNPUBLISHED)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-1709
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

THE TEXAS EDUCATION AGENCY
(LUBBOCK INDEPENDENT SCHOOL DISTRICT), ET AL.,

Defendants-Appellees,

VERSUS

DR. DAMON HILL, STEPHANIE HILL, KATHYL ANDERSON, SANDRA SALAZAR, and DR. SAM SPIKES,

Appellants,

Appeal from the United States District Court
for the Northern District of Texas
(CA5-806)

(December 30, 1991)

Before JOLLY, DAVIS, and SMITH, Circuit Judges.

Appendix A

JERRY E. SMITH, Circuit Judge:[1]

In this school desegregation case pending for more than twenty years, the appellants appeal the district court's denial of their motion to intervene as of right under Fed. R. Civ. P. 24(a)(2). The merits of the desegregation case are not before us.

Following entry of a consent decree in 1988, the Lubbock Independent School District ("LISD") on February 1, 1991, filed, pursuant to that decree, a notice of site selection for a new junior high school and a proposed reorganization plan for the school district. The appellants filed their motion to intervene on March 13, 1991. The magistrate judge conducted an extensive hearing, the transcript of which spans three volumes and 449 pages. In a comprehensive twenty-six page order, the magistrate judge determined that intervention should be denied. Following the filing of objections to the recommendation, the district court, in a twelve-page opinion, adopted the magistrate judge's findings and conclusions as its own and denied the motion to intervene. The court also granted the unsuccessful intervenors the status of amici curiae in order that they might express their views to the plaintiff, i.e., the United States, and to the court.

In *Bush v. Viterna*, 740 F.2d 350, 354 (5th Cir. 1984), we held that to intervene as a matter of right, a would-be intervenor must satisfy four requirements. We agree with the district court's conclusion that in this case, we need not consider the first three,

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1. Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

as we, like the district court, observe that the fourth requirement has not been met, i.e., that "the applicant's interest must be inadequately represented by the existing parties to the suit." *Id.*

Specifically, as the magistrate judge and district court found, the interests of the appellants are adequately represented by the government in this case. "[W]hen the party seeking intervention has the same ultimate objective as a party to the suit, a presumption arises that its interests are adequately represented, against which the petition must demonstrate adversity of interest, collusion, or nonfeasance." *Bush, id.* at 355.

Here, as the magistrate judge and district court noted, the primary interest of the appellants and the government is the same: to achieve a unitary school district. In school desegregation cases, intervention is denied when the interests alleged "are unrelated to desegregation and the establishment of a unitary school system." *United States v. Perry County Bd. of Educ.*, 567 F.2d 277, 280 (5th Cir. 1978). Here, the would-be intervenors complain of such things as the location of a junior high school and the decision not to use one facility as a full junior high school, but these matters are not "within the purview of the federal courts" unless they have "an impact on segregation." *Id. Accord Monteilh v. St. Landry Parish Sch. Bd.*, 848 F.2d 625, 632 (5th Cir. 1988). Moreover, "a cognizable interest in litigation does not inevitably result in a right to intervention." *Cajun Elec. Power Coop. v. Gulf States Utils.*, 940 F.2d 117, 120 (5th Cir. 1991).

Importantly, "where . . . the existing representative in the suit is the government, there is a presumption of adequate representation which may be overcome . . . only upon a showing of adversity of interest, the representative's collusion with the opposing party, or nonfeasance by the representative." *Texas v.*

Appendix A

United States Dep't of Energy, 754 F.2d 550, 553 (5th Cir. 1985). There is no adversity of interest here. As the district court noted, the government, like the appellants, has objected to certain aspects of the proposed reorganization plan, and the ultimate goal of the government is the same as appellants'. The appellants assert that collusion is shown by the fact of visits by LISD personnel to government officials in Washington, D.C. The district court properly noted, though, that such meetings were only a part of the process of negotiation, not collusion.

Finally, the district court discounted the appellants' assertion that the government is guilty of nonfeasance. The same district judge has presided over these proceedings since their inception in 1970. His opinion catalogues the diligent efforts of the government to achieve desegregation in LISD, and we give great weight to his conclusion that "[t]he Proposed Intervenors have wholly failed in showing inadequate representation on the part of the Government."

In summary, the appellants have not made a sufficient showing of inadequate representation by the government. The order denying intervention is AFFIRMED.

APPENDIX B — APPENDIX TO MEMORANDUM OPINION AND ORDER OF UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DATED SEPTEMBER 18, 1991

APPENDIX A Page 1

Elementary Schools[4]	1977-78[1] Minority Enrollment	1987-88[2] Minority Enrollment	1990-91[3] Minority Enrollment
Bozeman[5]	95.80%	59.33%	60.94%
Guadalupe	87.90%	58.12%	57.38%
Iles	99.45%	39.08%	38.50%

1. Figures taken from *United States v. Lubbock Independent School District*, 455 F. Supp. 1223, 1226 n.2 (N.D. Tex. 1978).

2. Figures taken from December 1, 1987 Report to the Court, Attachment # 2(1).

3. Figures taken from Defendant's Exhibit 60 - Proposed Desegregation Plan, Exhibit 5.

4. With the exception of Bozeman, these elementary schools were required to be desegregated by the Court's Order of January 27, 1978. *Lubbock Independent School District*, 455 F. Supp. at 1239.

5. Bozeman was ordered to be desegregated pursuant to the Court's Memorandum Opinion of April 15, 1981. At that time, its minority enrollment exceeded 95% (p.4). The July 15, 1981 Amended Plan of Desegregation to Comply with Court Order of April 15, 1981, which provided for the inclusion of Bozeman in the elementary busing plan, was approved by this Court's Order of July 20, 1981. While the April 15, 1981 Memorandum Opinion was vacated pursuant to the November 14, 1983 Mandate of the United States Court of Appeals for the Fifth Circuit, the July 20, 1981 Order has remained in full force and effect pursuant to the November 29, 1983 Consent Decree.

Appendix B

Elementary Schools	1977-78 Minority Enrollment	1987-88 Minority Enrollment	1990-91 Minority Enrollment
Mahon	88.34%	36.34%	45.86%
Martin	98.41%	62.31%	60.10%
Posey	99.18%	53.78%	55.21%
Sanders[6]	91.61%		
Wheatley	98.87%	55.94%	52.13%

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Junior High Schools	1969-70[7] Minority Enrollment	1977-78[8] Minority Enrollment	1987-88[9] Minority Enrollment	1990-91[10] Minority Enrollment
Struggs JHS[11]	98.35	94.57%		

6. Sanders was closed and its students reassigned to Guadalupe pursuant to the April 18, 1978 Plan of Desegregation (p.1), which was approved, as amended, by the Court's Memorandum and Order of May 8, 1978.

7. These figures are taken from *Lubbock Independent School District*, 316 F. Supp. at 1315.

8. These figures are taken from *Lubbock Independent School District*, 455 F. Supp at 1227.

9. These figures are taken from the December 1, 1987 Report to the Court, Attachment #2(3).

10. Figures taken from Defendant's Exhibit 60 — Proposed Desegregation Plan, Exhibit 5.

11. Struggs was closed as a junior high school and added to the Dunbar (Cont'd)

Appendix B

Junior High Schools	1969-70 Minority Enrollment	1977-78 Minority Enrollment	1987-88 Minority Enrollment	1990-91 Minority Enrollment
Matthews JHS[12]		94.61%	35.00%	43.43%

(Cont'd)
campus pursuant to the April 18, 1978 Plan of Desegregation (p. 4), which was approved, as amended by the Court's Order of May 8, 1978. Its students were temporarily assigned to Atkins, Hutchinson, and Slaton Junior High Schools pursuant to the same plan (p. 5). Pursuant to the November 2, 1987 Consent Decree, the former Struggs zone students were assigned to Atkins and Slaton. The 1987-88 minority enrollment at Atkins was 36.09%. December 1, 1987 Report to the Court, Attachment #4(1). The minority enrollment at Slaton, which was 71.98% in October 1987 (December 1, 1987 Report to the Court, Attachment #4(1), was reduced to 70.66% (April 4, 1988 Agreed Record, p. 41).

12. Matthews Junior High School was ordered to be desegregated pursuant to the Court's Memorandum Opinion of April 15, 1981. At that time, its minority enrollment was approximately 94% (p.3). The July 15, 1981 Amended Plan of Desegregation to Comply with Court Order of April 15, 1981, was approved by this Court's Order of July 20, 1981. While the April 15, 1981 Memorandum Opinion was vacated pursuant to the November 14, 1983 Mandate of the United States Court of Appeals for the Fifth Circuit, the July 20, 1981 Order has remained in full force and effect pursuant to the November 29, 1983 Consent Decree.

Pursuant to the Amended Plan of Desegregation, Matthews became a 7th Grade Learning Center for all 7th grade students in the Matthews, Evans, and Mackenzie Junior High School attendance zones, and Matthews 8th and 9th grade students were assigned to Evans Junior High School. The 1987-88 minority enrollment at Evans was 37.37%. December 1, 1987 Report to the Court, Attachment #(1).

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Dunbar High School[13]

School Year	Minority Enrollment
1969-70[14]	99.15%
1977-78[15]	87.85%
1978-79[16]	58.69%
1979-80	56.84%
1980-81	58.18%

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13. Dunbar High School was ordered to be desegregated in 1970. *Lubbock Independent School District*, 316 F. Supp. at 1315. In 1978, this Court found that the 1980 desegregation plan had not effectively integrated Dunbar and ordered the Lubbock Independent School District to submit a new plan to desegregate Dunbar. *Lubbock Independent School District*, 455 F. Supp. at 1239. Pursuant to the April 18, 1978 Plan of Desegregation (pp. 60-69), the Struggs Junior High School facility was added to Dunbar (now called Dunbar-Struggs) to form a Magnet Complex at which special courses were offered. While the minority enrollment at Dunbar-Struggs has increased in recent years, the enrollment figures demonstrate that it did become desegregated as a result of this plan.

14. These figures are taken from *Lubbock Independent School District*, 316 F. Supp. at 1312.

15. These figures are taken from *Lubbock Independent School District*, 455 F. Supp. at 1227.

16. These figures for the years 1978-79 through 1987-88 are taken from December 1, 1987 Report to the Court, Attachment #2(2)—(3).

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School Year	Minority Enrollment
1981-82	63.70%
1982-83	66.33%
1983-84	69.09%
1984-85	70.05%
1985-86	69.81%
1986-87	69.84%
1987-88	73.60%
1988-89[17]	73.01%
1989-90[18]	77.54%
1990-91[19]	81.90%

17. These figures are taken from the October 1, 1988 Report to the Court.

18. These figures are taken from the December 1, 1989 Report to the Court.

19. These figures are taken from Defendants Exhibit 60—Proposed Desegregation Plan.

Lubbock Independent School District
Lubbock, Texas

PROPOSED ELEMENTARY DESEGREGATION PLAN
1991-92

Minority students involved in the desegregation plan will be transported to a non-minority school for one year in grades three, four, and five.

Non-minority students involved in the desegregation plan will be transported to a minority school for one year in grades three, four, and five.

Summary of Minority and Non-Minority
Transported Students

Minority School Sending/ Receiving	School Receiving Minority Students	Grade	Beginning Letter of Last Name	School Sending Non-Minority Students	Grade	Beginning Letter of Last Name
Bozeman	Waters	3	A-H	Maedgen	5	A-L
		4	I-P		3	M-Z
		5	Q-Z	Waters	4	A-L
					3	M-Z
Guadalupe	Stewart	3	A-H	Haynes	4	A-L
		4	I-P		5	M-Z
		5	Q-Z	Stewart	4	A-L
					3	M-Z

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Minority School Sending/ Receiving	School Receiving Minority Students	Grade	Beginning Letter of Last Name	School Sending Non-Minority Students	Grade	Beginning Letter of Last Name
Mahon				Hardwick	4	A-L
					5	M-Z
				Rush	3	A-L
					4	M-Z
Martin	Parsons	3	A-H	Bowie	5	A-L
		4	I-P		3	M-Z
		5	Q-Z	Parsons	4	A-L
Posey	Honey	3	A-H	Honey	3	M-Z
		4	I-P		4	A-L
		5	Q-Z	Murfee	3	M-Z
					5	A-L
Wheatley	Whiteside	3	A-H	Smith	4	M-Z
		4	I-P		3	A-L
		5	Q-Z	Whiteside	5	M-Z
					3	A-L
					4	M-Z

The following schools,would no longer be required to bus neighborhood students because of the resident ethnic balance in their neighborhoods.

School	N-M Percent
Bayless	64
Overton	70
Stubbs	67
Wester	65
Wheelock	64
Williams	70

Iles and Mahon will no longer bus neighborhood students because of the small numbers. They will receive students only.

Iles, Tubbs, Ramirez, and Roscoe Wilson Elementary Schools would remain magnet schools. Majority students will continue to be assigned to Tubbs and minority students to Roscoe Wilson based on applications by parents. Both majority and minority students will continue to be assigned to Iles and Ramirez.

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APPENDIX C Page 1

LUBBOCK INDEPENDENT SCHOOL DISTRICT
MINORITY ENROLLMENT (PERCENTAGES)

	1969-70[1]	Oct.[2] 1977	Sept.[3] 1987	Oct.[4] 1990	Projected upon Implementation of Proposed Plan[5]
Elementary Schools:					
Arnett		66.29	80.74	88.84	81.
Bayless		9.24	38.0	43.81	40.
Bean		67.09	89.95	89.18	88.
Bowie		5.39	10.77	13.12	10.
Bozeman		***95.98***	***59.33***	***60.94***	***67.***
Brown		27.62	61.72	58.60	59.
Dupree		35.71	68.14	74.52	77.
Guadalupe	***100***	***87.90***	***58.13***	***57.38***	***56.***
Hardwick		7.90	32.07	30.34	37.
Harwell		84.49	92.37	94.67	95.

Note: Schools in Bold print are schools which were previously found by the Court to be *de jure* segregated schools.

1. 316 F.Supp. 1310 (N.D. Tex. 1970)

2. 600 F.2d 518, Appendix A (5th Cir. 1979)

3. December, 1987 Report to the Court

4. December, 1990 Report to the Court

5. Defendants' Trial Exhibits 58 and 62

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	1969-70	Oct. 1977	Sept. 1987	Oct. 1990	Projected upon Implementation of Proposed Plan
Haynes		1.96	12.50	15.16	13.
Hodges		38.71	76.82	79.94	80.
Honey			19.57	18.61	14.
Hunt		95.35	99.10	99.49	97.
Iles	***99.74***	***99.46***	***39.08***	***38.50***	***41.***
Jackson		85.55	94.06	97.42	97.
McWhorter		94.49	97.05	97.21	97.
Maedgen		3.66	27.90	27.87	28.
Mahon		***87.89***	***36.64***	***45.86***	***38.***
Martin	***99.32***	***98.41***	***62.31***	***60.20***	***67.***
Murfee		2.24	9.05	21.86	16.
Overton		11.91	40.07	36.79	36.
Parkway		96.84	98.77	99.26	98.
Parsons		4.81	22.58	23.71	21.
Posey	***99.23***	***99.18***	***53.78***	***55.21***	***65.***
Ramirez			***74.30***	***76.53***	***74.***
Rush		7.38	23.70	19.03	22.
Sanders	***96.14***	***91.61***			
Smith			***7.62***	***7.02***	***10.***
Southeast		75.00			
Stewart		6.08	37.57	37.26	37.
Stubbs		13.44	31.28	33.14	33.
Tubbs		94.66	70.78	61.39	64.
Waters			25.60	30.42	30.
Wester		4.56	25.54	37.09	30.
Wheatley	***100***	***98.90***	***55.94***	***52.13***	***60.***
Wheelock		14.86	36.41	46.03	38.

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	1969-70	Oct. 1977	Sept. 1987	Oct. 1990	Projected upon Implementation of Proposed Plan
Whiteside			18.77	21.85	30.
Williams		3.90	34.22	33.87	33.
Wilson		19.48	32.74	33.20	34.
Wolffarth		89.30	80.87	82.28	80.
Wright		57.86	64.66	70.43	72.
Junior High Schools					
Alderson	73.89	94.85	96.85	95.81	95.
Atkins		13.11	36.31	61.97	30.
Cavazos					70.
Dunbar					91.
Evans		2.09	36.84	38.73	15.
Hutchinson		8.49	28.34	38.19	55.
Irons				31.73	15.
MacKenzie		7.67	38.81	43.95	31.
Matthews	***76.***	***94.61***	***35.00***	***43.43***	
Slaton		55.62	72.52	60.69	55.
Wilson		8.67	35.37	37.19	23.
Struggs	***98.35***	***94.57***			
Thompson		81.76			
High Schools					
Coronado	1.00	4.80	15.04	18.79	29.
Dunbar-Struggs	***99.15***	***87.94***	***73.60***	***81.90***	
Estacado	66.09	92.11	95.29	95.90	83.
Lubbock	35.17	60.50	52.02	55.98	48.
Monterey	1.00	2.90	12.26	22.71	35.

APPENDIX C —JUDGMENT OF UNITED STATES DISTRICT COURT OF SEPTEMBER 18, 1991

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS LUBBOCK DIVISION

Civil Action No. CA5-806

THE UNITED STATES OF AMERICA,

Plaintiff

v.

LUBBOCK INDEPENDENT SCHOOL DISTRICT: MIKE MOSES, Superintendent (successor to Edwin H. Irons, Superintendent); THE TEXAS EDUCATION AGENCY; and DR. J. W. EDGAR, Commissioner of Education,

Defendants.

JUDGMENT

By Memorandum Opinion and Order of even date herewith, the Court has entered its findings of fact and conclusions of law to support the Judgment herein entered.

Accordingly, it is the Judgment and Order of this Court that all orders and decrees for injunctive relief are hereby dissolved and terminated and the Lubbock Independent School District and other defendants to this suit are hereby released from same. Further, the Lubbock Independent School District will no longer require this Court's supervision or authority for its promulgation and enactment of policies and rules regulating such matters as student and faculty assignments, attendance zones, staff,

transportation, extra-curricular activities and facilities.

It is further ORDERED that the proposed modification of the current desegregation plan as submitted by the Lubbock Independent School District in its Motion to Modify the Existing Desegregation Plan, together with amendments thereto, is hereby approved and granted, with the specifics of the plan to be within the control and power of the Lubbock Independent School District, its Board of Trustees, and administrators pursuant to Tex. Ed. Code § 23.26(b).

It is the further ORDER of this Court that the complaint and all causes of action alleged herein, whether by way of complaint, cross-action or counter-claim, are dismissed with prejudice.

Costs incurred herein shall be and they are hereby adjudged against the party incurring same.

SO ORDERED.

The Clerk shall furnish a copy hereof to all attorneys.

Dated September 18th, 1991.

s/ Halbert O. Woodward
HALBERT O. WOODWARD
Senior United States District Judge

APPENDIX D — MOTION FOR VOLUNTARY DISMISSAL AND ENTRY OF DISMISSAL BY THE CLERK OF THE FIFTH CIRCUIT ON JANUARY 21, 1992

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-7252

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

TEXAS EDUCATION AGENCY (LUBBOCK INDEPENDENT SCHOOL DISTRICT), et al.

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

MOTION OF THE UNITED STATES FOR VOLUNTARY DISMISSAL

The United States, appellant herein, hereby moves to dismiss this appeal pursuant to Fed. R. App. P. 42(b). No costs have been incurred.

Respectfully submitted,

MARVIN COLLINS
United States Attorney
JOHN R. DUNNE
Assistant Attorney General

Appendix D

s/ Rebecca K. Troth
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CERTIFICATE OF SERVICE

I certify that on this 17th day of January 1992, one copy of the foregoing Motion of the United States for Voluntary Dismissal was mailed by first class mail to the following addresses:

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ENTRY OF DISMISSAL

Pursuant to the foregoing motion of appellant, Rule 42, FRAP, and Rule 42.1 of this court, the above referenced appeal was duly entered dismissed this 21st day of January, 1992.

GILBERT F. GANUCHEAU
Clerk of the United States Court
of Appeals for the Fifth Circuit

By Susan Vaughn
Deputy Clerk
FOR THE COURT — BY
DIRECTION

APPENDIX E — RULE 24, FEDERAL RULES OF CIVIL PROCEDURE

RULE 24, Intervention

(a) Intervention of Right, Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers and unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When

the constitutionality of an act of Congress affecting the public interest is drawn in question in any action in which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C. § 2403. When the constitutionality of any statute of a State affecting the public interest is drawn in question in any action in which that State or any agency, officer, or employee thereof is not a party, the court shall notify the attorney general of the State as provided inTitle 28, U.S.C. § 2403. A party challenging the constitutionality of legislation should call the attention of the court to its consequential duty, but failure to do so is not a waiver of any constitutional right otherwise timely asserted.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff Aug. 1, 1987.)